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THE CONSTITUTIONAL COURT

Democratic Party Response to the Twelfth Report of the Technical Committee on Constitutional Issues

Before setting out our response to the specific questions raised, it will be helpful to outline the Democratic Party's vision of the Constitutional Court. Two major models for a Constitutional Court have influenced the constitutional debate: the redress model, and the conservative model. The proposals put forward by the Technical Committee on Constitutional Issues are influenced by the redress model, and the response of the Chief Justice is influenced by the conservative model. There is much to be learnt from each model, but in our view they both fall short of what South Africa needs. It will help clarify the DP's vision if we discuss the other two models first.

1. THE REDRESS MODEL AND THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

The primary concern of the redress model is to transfer as much judicial power, as fast as possible, to people who have in the past been excluded from the judiciary - blacks, women, and, perhaps, those of the left. Under the new Constitution, constitutional law will dominate our legal system. In the Constitutional Court, the redress model sees a new source of judicial power, by which immediately to transfer influence to voices hitherto unheard, or underheard, in our judicial system.

The redress model acknowledges grave difficulties in the way of the immediate appointment of large numbers of judges from underrepresented sectors to the ordinary bench. It consequently seeks to maximize the power of the Constitutional Court, in order to maximize the impact of the few such judges who could more easily be appointed swiftly to that Court. For the same reason, the redress model seeks to minimize the power of the ordinary courts. To facilitate the rapid appointment to the Constitutional Court of judges from underrepresented sectors, the model favours means of appointment which are political, and criteria of eligibility which are wide.

The concerns which actuate the redress model are not illegitimate. Our judiciary is overwhelmingly white and male, and the National Party's exclusive control over the appointment of judges for the past 45 years has meant that those with views acceptable to that party are substantially overrepresented on the bench. This is not to deny that there are many judges on the bench with views very different from that of the Government, or to deny the fearless independence of many of our judges. But any judiciary from which the perspective of most of our racial

groups, all our women, and much of our politics is systematically excluded will necessarily have a narrower understanding of the society over which it adjudicates than one which includes those perspectives. It will consequently dispense a poorer kind of justice, and lack the confidence of those it governs.

So the concerns which underlie the redress model are important. But they must be weighed against other concerns which have to be respected if all South Africans are to have confidence in the courts. The paramount concern must be to design a judicial system which protects rights as well as they can be protected, which dispenses the best justice possible. The redress model, as appears below, gives too much weight to a single concern.

The proposals of the Technical Committee on Constitutional Issues, though they are not the redress model in its purest form, are dominated by that model. Consistently with that model, the Technical Committee envisages selection of constitutional judges by purely political bodies. And although the TC's proposals may appear, on a superficial examination, to retain a role in constitutional adjudication for the ordinary courts, the actual effect of what is proposed could be to concentrate the great bulk of politically significant judical power in the Constitutional Court and reduce the ordinary courts to a relatively menial role.

Thus, for example:

(a) <u>The Appellate Division is to be stripped of all constitutional jurisdiction</u>.

The Technical Committee's cl 90 (3) eliminates the jurisdiction of the Appellate Division to decide any matter within the jurisdiction of the Constitutional Court. The notion is that the Constitutional Court will be the court of final appeal on constitutional questions, the Appellate Division the court of final appeal on non-constitutional questions. On the surface, there appears to be a symmetry in their powers. But it is an illusion.

The jurisdiction of the Constitutional Court is defined in the widest terms possible. Under cl 87 (2), it includes not only the constitutionality of any law or governmental action, but also the violation or anticipated violation of any fundamental right, which would probably include most significant questions of the interpretation of legislation or common law touching a fundamental right. The Constitutional Court is also given the last word on whether a question falls within its jurisdiction (cl 87 (2) <u>(f)</u>).

What happens, then, when cases come up on appeal which raise questions both of constitutional law and of statute or common law, or even fact? The TC's proposals, read as whole, can be interpreted to require the case to be split, the

constitutional questions going to the Constitutional Court, the non-constitutional questions to the Appellate Division; but they can also be interpreted to permit the Constitutional Court to take on the whole case (see, in particular, cl 90 (8)).

In fact, all the pressures will conduce to the Constitutional Court taking the whole case. First, to split a case between two courts will be awkward and expensive. It could multiply costs, aggravate delay, and cause unnecessary hearings. Secondly, the jurisdiction of the Constitutional Court is expressed in the widest language. Thirdly, the decision about where the case should go rests, ultimately, with the Constitutional Court itself.

The tendency will be for the Constitutional Court to absorb more and more of the appellate caseload, including many of the important non-constitutional questions in it. The great bulk of the cases raising questions of public importance will perforce be constitutional cases, and will end up in the Constitutional Court.

The Appellate Division will be left with the least consequential cases. Most criminal cases raising questions of fair procedure, for instance, are likely to put in issue some procedural right guaranteed in the Bill of Rights. And if the Bill of Rights is given horizontal effect (an as yet unresolved question), even many of the most important private-law and commercial cases might be absorbed by the Constitutional Court. The Appellate Division will be thoroughly marginalized, left to decide only the Constitutional Court's hand-me-downs. It will become the court of mundane appeals.

This proposal, therefore, suggests a strong desire to concentrate power in the Constitutional Court, consistently with the redress model.

(b) <u>Only the Constitutional Court can pronounce on the validity of an Act of Parliament</u>.

The effect of this proposal (cl 90 (4) <u>(a)</u> and (5)), perversely, is that on what may be the most important constitutional cases, the Constitutional Court has to decide the matter without the benefit of a hearing in a lower court. Where is the evidence to be collected? It will be very unwieldy to try questions of fact in the Constitutional Court itself. And why should the Constitutional Court forfeit the advantage of having the issues refined by argument below?

To deprive the Constitutional Court of the benefit of the hearing below in what may be the most important kinds of cases is obviously anomalous. That anomaly is further evidence of an anxiety to transfer power from the ordinary courts to the Constitutional Court.

(c) The Constitutional Court may provide for direct access to itself under any conditions.

Clause 90 (10) empowers the President of the Constitutional Court to make rules providing for direct access to the Constitutional Court in respect of any matter within the jurisdiction of the Constitutional Court (see also cl 89 (3)). The effect is to give the Constitutional Court the power to bypass any other court, in any circumstance whatsoever, provided that the case falls within the jurisdiction of the Constitutional Court, something which is widely defined, and on the limits of which the Constitutional Court itself is the last word.

The Constitutional Court consequently has the power to deprive all the lower divisions of the Supreme Court (which the Technical Committee's proposals envisage hearing constitutional cases before they go up to the Constitutional Court on appeal) of any constitutional jurisdiction they may have, and deciding the case entirely on its own.

It is true, of course, that there may be some cases in which the urgency and the importance of the case require fast access to the Constitutional Court. That can be achieved by special provision for the Constitutional Court to hear an appeal as a matter of urgency, or, if it is genuinely necessary and there are no questions of fact to be canvassed, even for the whole case to be decided at first and final instance in the Constitutional Court. But the conditions which justify such special treatment should be stated explicitly. What is objectionable about the Technical Committee's proposals is that they are unlimited - no constraints are put on the Constitutional Court's power to give itself direct access jurisdiction, no conditions stated to justify it.

This, too, suggests a concern to concentrate power in the Constitutional Court, compatibly with the redress model.

What, then, is wrong with concentrating so much power in the Constitutional Court? For one thing, the workload which accompanies excessive jurisdiction may overwhelm the Court, and generate huge delays in access to the Court which render the fundamental rights of many citizens worthless. Elsewhere, constitutional courts which have overreached themselves in this way have built up backlogs as long as seven years. The effect, for many citizens, may be to make their fundamental rights effectively unenforceable: justice delayed that long will often be justice denied. But the principal difficulty to which an excessive concentration of power in the Constitutional Court gives rise, as the discussion above shows, is that it entails depriving the ordinary courts of constitutional jurisdiction.

To that there are two main objections. First, if the ordinary courts are excluded from constitutional adjudication, the values in the Bill of Rights will tend not to influence the development of the common law, which will consequently be impoverished.

Secondly, if the ordinary courts are cut off from the Bill of Rights, they are bound to be less committed to it than if they were entrusted with its enforcement and its application. So if the Bill of Rights comes under threat of withdrawal at the hands of the Government - as it has in so many newly constitutionalized countries - they are less likely to perceive themselves as its principal guardians. The defence of the Bill of Rights may well fall to the Constitutional Court alone. And the Constitutional Court, isolated from the ordinary judiciary, may prove as vulnerable to executive destruction as the Bill of Rights itself.

The redress model has also excessively influenced the method of appointment favoured by the Technical Committee. Clause 88 (3) recommends nomination by a joint standing committee of Parliament comprising one member of each party represented in both the National Assembly and the Senate (or is it one representative for each party represented in the National Assembly and one for each party represented in the Senate? - the clause is ambiguous).

If the Parliamentary committee cannot reach unanimity, 75% of its members can nominate the President of the Constitutional Court and eight of its judges, and a majority of the remaining 25% the other two judges (cl 88 (4)). (What, may one ask in passing, if 95% of the committee agrees on the President and eight judges? Does a majority of the remaining 5% (ie 3%) obtain the power to nominate the remaining two judges? If not, which 75% are taken to have exercised their power, and which 20% still get to participate in the 25% which chooses the remaining two judges?)

The nominations must be approved by a 75% majority of a joint sitting of both Houses of Parliament (cl 88 (3)). The most obvious difficulty is that no provision is made for breaking the deadlock if a 75% majority proves unattainable either in the Parliamentary commmittee or in the joint sitting.

A deeper difficulty is the principle itself underlying the proposed method of appointment - political supermajority. The effect of that principle is to require any candidate to be acceptable to more than one political party, possibly several. The effect of that is to tend to favour candidates from the political centre, to favour candidates with a bland judicial approach, and even to favour candidates who have never made enough of a jurisprudential mark to offend too many political parties.

The effect might easily be to deprive the Constitutional Court of the range of opinion which enriches constitutional debate. If

an object of creating a Constitutional Court is to include in the judicial system underheard perspectives, it might well be thwarted by the proposed method of selection. That method might produce a Court in which the dissenting and separate concurring judgments that engage the imagination of the public and force a deep examination (both in court and in society generally) of the most controversial issues are rare. It might well produce a Court which will find it easy to reach a comfortable but glib consensus on the central debates of the day.

The Technical Committee's proposed method for selecting constitutional judges contrasts sharply with its suggestion for choosing ordinary judges - appointment, in effect, by a Judical Service Commission (cl 92 (1)). That contrast, too, discloses the excessive influence of the redress model. Why should the ordinary judges have to be chosen by a body with enough lawyers to evaluate their qualifications, but the constitutional judges be chosen by a process which is purely political?

The redress model is likewise too evident in the qualifications that the Technical Committee proposes for constitutional judges. They would apparently permit non-lawyers to become constitutional judges (cl 88 (2) (d)). If the Constitutional Court is to decide cases on constitutional principle, rather than as political choices, this seems unwise.

2. THE CONSERVATIVE MODEL AND THE CHIEF JUSTICE

The conservative model is at the opposite extreme. Reluctant to recognize the kind of deficiencies in our existing judicial structure outlined above, it seeks to minimize the disruption of the existing judicial system occasioned by the advent of a Bill of Rights, and tries to retain as much constitutional jurisdiction for the existing judiciary as possible.

Again, the Chief Justice's proposals are not the conservative model in its pure form, but they do reflect its influence. The Chief Justice suggests retaining the existing judicial system nearly intact, but creating a specialized Constitutional Chamber within the Appellate Division, staffed by himself and as many existing Appellate Division judges as specially appointed constitutional judges. Save for that difference, the existing judicial system would operate with merely minor alterations.

The Chief Justice's memoranda on the present topic are a cogent and invaluable critique of the redress model in general, and the Technical Committee's proposals in particular. We agree with much of what is contained in those memoranda, especially where they demonstrate the unworkability of some of the TC's proposals. But it cannot be a complete argument against those proposals that they 'will tend to diminish the status of the Appellate Division' and of the office of Chief Justice ('This, in itself, is something to be avoided', says the Chief Justice's memorandum of 13 September 1993 at p 3). Whether that is desirable or undesirable is a function of one's attitude to the concerns about the existing judicial system canvassed above. And the Chief Justice's proposals, with respect, are insufficiently responsive to those concerns.

3. A COURT OF CONSTITUTIONAL PRINCIPLE: THE DEMOCRATIC PARTY'S VISION

One of the deepest deficiencies of the Apartheid order was that it was authoritarian: what government said went, without challenge or question. The Bill of Rights must inaugurate a counter-order, under which every law, and every governmental decision, is open to challenge under the values that the Bill enacts. The Bill of Rights, therefore, must usher in a culture of justification: a culture in which every lawmaker and every official can be called upon to justify his or her actions in terms of the values for which the Bill stands.

It is of the utmost importance that every judge should be part of the culture of justification. It is essential that the values in the Bill of Rights permeate every corner of our law, and that every judge feel responsible for defending the Constitution against any threat.

We are consequently opposed to any systematic attempt to exclude the ordinary courts from constitutional jurisdiction. We are not insensitive, however, to the need to bring unheard and underheard perspectives - especially unheard and underheard racial and sexual perspectives - into our judiciary. That must be done fast, especially in that part of the legal system responsible for protecting our fundamental rights.

We also believe that there is a need for a court uncluttered by detail and mundanity, free to give direction on the great questions of principle, such as the United States Supreme Court and the House of Lords. In the U S and England, most cases go no further than the court of appeal just below the Supreme Court and the House of Lords. Only a relative handful of cases go on to the highest court for a further appeal. They are carefully selected for their pathfinding potential, and the highest court sees itself as a direction-giver, not a routine appeals-processor. In the U S, the bulk of those cases are, in the nature of things, constitutional cases.

We propose that the Constitutional Court should have a similar identity: that it should be a court of constitutional principle. The Supreme Court, including the Appellate Division, should retain their ordinary jurisdiction and acquire full constitutional jurisdiction. Most cases would terminate at the Appellate Division, which would decide all questions of law and fact that it does now, and any question of constitutional law arising before it. The Appellate Division would be the last word on any question of fact or non-constitutional law decided by it. If, however, an unsuccessful party before the Appellate Division was aggrieved by a decision given on a point of constitutional law by the AD, that party would be entitled to petition the Constitutional Court for leave to bring a further appeal, solely on the point of constitutional law.

This system would have several advantages. First, the Constitutional Court would have a manageable enough workload to

be able to give thoughtful direction on the groundbreaking questions. Secondly, all the courts, including the AD, would remain involved in the constitutional enterprise, fully part of the culture of justification. Thirdly, the AD would remain the court of last resort on questions of fact and non-constitutional law. That would spare it the comprehensive marginalization which is certainly its fate under the Technical Committee's proposals. Fourthly, the Constitutional Court could be a very effective instrument for including unheard and underheard perspectives into the judicial system.

Appointment

If the Constitutional Court is to be a court of constitutional principle, its members must be capable of deciding cases as questions of principle, not as merely political choices. That entails rejecting any system of political horsetrading as a means of choosing the constitutional judges. We cannot see why the method for choosing constitutional judges should differ fundamentally from that for choosing ordinary judges. We would suggest that the constitutional judges be nominated by a Judicial Service Commission (modelled on that suggested by the Technical Committee for the selection of ordinary judges), constituted as follows:

* The Chief Justice (chair)
* The Minister of Justice
* The Director-General of Justice
* An advocate, representing the General Council of the Bar
* An attorney, representing the Association of Law Societies
* A professor of law, representing the Deans of Law
* The two senior Judges President
* 5 members of the Parliamentary Standing Committee on Justice designated by the Senate.

To meet the objection that the legal profession is presently dominated by white males, and that the perspectives of white males might therefore be represented disproportionately on the Commission, we would suggest that the Commission's nominees should have to be submitted for approval or rejection (but, in the interest of an independent judiciary, not substitution) to the Senate.

Finally, it is far from clear why the Technical Committee wants to entrench a procedure to interview candidates for the Constitutional Court <u>in camera</u> (cl 88 (3)). South Africa has only just begun the long journey towards open government. It seems quite wrong in principle to use the Constitution to pre-empt debate about the desirability of this kind of secrecy. The authority entrusted with selecting judges should at the very least have the power to develop open procedures after full consideration of the implications. This provision is far too prescriptive.

Qualifications

A court of constitutional principle must be staffed by the persons best qualified to decide questions of constitutional principle. Since only lawyers are professionally trained to decide such questions, we doubt the wisdom of appointing non-lawyers to the Constitutional Court, as is apparently envisaged by cl 88 (2) (d) of the Technical Committee's report.

On the other hand, if the fundamental rights of all South Africans are to be secure, their ultimate custodianship must be entrusted to the best possible candidates. We consequently support the Technical Committee's proposal to widen the pool of eligible candidates from the senior bar to include well qualified attorneys and academic lawyers.

But it seems inconsistent with the philosophy of reaching out to all the available talent to exclude non-South African citizens (cl 88 (2) (a)). Our neighbours Zimbabwe and Namibia have gained immensely during their own transitions to democracy by appointing non-citizens (eg Messrs Justices Dumbutshena and Mahomed) to their highest courts. The possibility of appointing a non-citizen may be an invaluable way of ensuring that an underheard perspective is articulated on the Constitutional Court through a judge of international distinction. There may of course be considerations to the contrary; but what reason can there be for pre-empting the debate by a constitutional disqualification? Surely the question should be left open to be decided, by those constitutionally entrusted to choose the judges, in the light of the needs affecting the question when it arises?

Urgent and Direct Access to the Constitutional Court

Direct access to the Constitutional Court is something which may be abused to deprive the ordinary courts of a constitutional jurisdiction that they ought properly to have. It should consequently be permitted only when it is genuinely necessary. It may be thought, for instance, that, where no questions of fact arise, and consequently no evidence needs to be marshalled, and the validity of some major governmental programme is in issue which needs very urgently to be settled finally in the interests of certainty and stability, the Constitutional Court should have direct and final jurisdiction. The conditions under which such jurisdiction arises, however, must be rigorously defined to avoid abuse.

It is important to appreciate, moreover, that the need for direct jurisdiction is often exaggerated, because there may be other means of solving the problem which do not suffer the disadvantage of depriving the Constitutional Court of prior consideration by another court. One is to establish an accelerated route through the courts for cases of great urgency. In England, for instance, urgent and important cases can go through the High Court, the Court of Appeal and the House of

Lords in a few weeks, when necessary. And in the United States important and urgent cases can be heard in a specially constituted three-judge District Court, then leapfrog directly over the Circuit Court of Appeal to the Supreme Court. The development of similar devices should not be beyond our own ingenuity.

Direct jurisdiction may be desirable also to permit anticipatory review - review for constitutionality of a bill prior to enactment by Parliament. We would suggest that the right to apply for such review should be given to any party commanding 10% of the seats in either House of Parliament and to any SPR government which believes its rights or competence to be threatened by a bill before Parliament.

If anticipatory review is provided for, however, we would strongly oppose any suggestion that the failure of an application for such review should in any way protect the bill from post-enactment challenge by an individual affected by it. Many constitutional defects become apparent only when the law is applied in a concrete context to a live individual. It would seriously stultify individual rights if anticipatory review had the effect of insulating the law from constitutional challenge by an individual, or if it in any way increased the individual's burden on post-enactment review. Anticipatory review must be an additional remedy, designed only to strengthen judicial protection of fundamental rights.

SPECIFIC QUESTIONS

A: Should the Constitutional Court be a separate court or an integral part of the ordinary court structures, or should a hybrid system be developed?

As explained, the Constitutional Court should be a separate court - a court of further appeal on constitutional questions alone - but it should be integrated with the ordinary courts in the sense that they should retain full constitutional jurisdiction.

B: Should the Constitutional Court be part of or separate from the AD?

Separate, as explained - the AD must be the last word on non-constitutional questions, but a litigant dissatisfied with its ruling on constitutional questions should have a right to petition the Constitutional Court for leave to appeal further on those constitutional questions.

C: What should the ambit of the Constitutional Court be?

It should primarily be a court of further appeal on constitutional questions alone, as explained above. If (and only if) it is, we have no objection to the way in which its jurisdiction is defined in cl 87 (2).

D: How should laws contrary to the Constitution be dealt with?

Ordinarily they should be struck down; but there is much merit in giving the courts the power, in exceptional circumstances, to suspend a declaration of nullity for a fixed period to give government an opportunity to rectify the defect. This power can be invaluable to avoid disastrous disruption of an essential government programme upon which thousands may be dependent. It would also spare the courts the temptation to uphold a constitutionally suspect law just to avoid such disruption.

A power such as this is envisaged in cl 87 (4), but it should be exercised only exceptionally, and the conditions on which it may be exercised should consequently be defined much more precisely than they are in that clause. Consideration should also be given to putting an upper limit on the time within which the defective law must be rectified. These constraints are necessary to avoid abuse.

E: Should a procedure be provided for in terms of which the Constitutional Court can be approached to give an opinion on the constitutionality of a bill before it becomes law?

See comments on anticipatory review under <u>Urgent and Direct Access to the Constitutional Court</u> above.

F: Qualifications of the judges of the Constitutional Court and their appointment method.

See <u>Appointment</u> and <u>Qualifications</u> above.

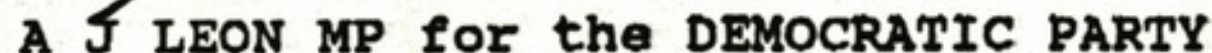
G: The extent to which the existing court structures should be continued or reorganized.

The existing court structures should be altered as little as possible during the transition.

H: Appointment and removal of judges from office.

We support the proposal that in the appointment of ordinary judges, the President should be bound by the advice of the Judicial Service Commission. The same should apply to the removal of a judge. The wording of cl 92 (4) should in consequence be tightened to make it clear that the President has no discretion to override the Commission.

This is our preliminary response to the Twelfth Report of the Technical Committee on Constitutional Issues and to the questions raised.



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4 October 1993 C:\MISC\CONCOURT.DP